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Supreme Court, U.S.
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No. 00-8452

IN THE

SUPREME COURT OF THE UNITED STATES

DARYL RENARD ATKINS,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Petition for a Writ of Certiorari to the
Supreme Court of Virginia

SUPPLEMENT TO COMMONWEALTH'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should certiorari be granted to review an issue that was neither timely filed in this Court nor raised below?

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STATEMENT OF THE CASE

On February 1, 2001, Atkins filed his petition for writ of certiorari raising only the following issues:

I. The Virginia Supreme Court decided an important question of federal law in a way that conflicts with relevant decisions of this court; and

II. The Virginia Supreme Court's second ground for denying admission of the evidence is contrary to the decisions of this court.

On or about March 8, 2001, the Commonwealth filed its brief in opposition. Now, four weeks later, Atkins has filed a "supplement" to his petition for writ of certiorari raising an entirely new issue.

SUPPLEMENTAL REASONS FOR DENYING THE WRIT

I. ATKINS' SUPPLEMENTAL CLAIM IS JURISDICTIONALLY BARRED.

Atkins contends that his execution would violate the Eighth Amendment because he allegedly is mentally retarded and there is now a recognized national consensus against executing the mentally retarded. Atkins, however, never raised this Eighth Amendment claim in the Virginia Supreme Court. Indeed, it was only in conjunction with his assertion that his sentence was disproportionate under Virginia Code § 17-110.1C(1) that Atkins even mentioned

his alleged mental retardation.*

In the Virginia Supreme Court, Atkins conceded that the Eighth Amendment does not prohibit execution of the mentally retarded. (Virginia Supreme Court Br. at 11). Atkins thus argued solely as a matter of state law as follows:

> Mr. Atkins has been unable to find a case ***in Virginia*** in which an individual with an IQ of 59 has been sentenced to death. While this Court has upheld death sentences for individuals with low IQs (See Waye v. Commonwealth, 219 Va. 683, 251 S.E.2d 202 (1979) (low normal intelligence); Washington v. Commonwealth, 228 Va. 535, 323 S.E.2d 577 (1984) (69 IQ); Correll v. Commonwealth, 232 Va. 454, 352 S.E.2d 352 (1987) (68 IQ); and Yeatts v. Commonwealth, 242 Va. 121, 410 S.E.2d 254 (1991) (70 IQ), today society's standards have evolved to the point that imposition of the death penalty on an individual with a 59 IQ who is not eligible for parole ***is excessive***.

(Virginia Supreme Court Br. at 11, emphasis added). Atkins' argument below expressly did not rely on the Constitution.

The Virginia Supreme Court, moreover, specifically and solely considered only what it was asked to consider: whether Atkins' alleged mental retardation rendered his sentence disproportionate under § 17.1-313(C):

> Thus, considering "both the crime and the defendant," Code § 17.1-313(C), and the record before us, we cannot say that Atkins' sentence of death is excessive or disproportionate to sentences generally imposed in this Commonwealth for capital murders comparable to Atkins' murder of Nesbitt. We are not willing to commute Atkins' sentence of death to life imprisonment merely because of his IQ score. Dr. Nelson and Dr. Samenow agreed that an IQ score is not the sole definitive measure of mental retardation. Both experts also testified that Atkins was able to appreciate the criminality of his conduct and understood that it was wrong to shoot Nesbitt.
>
> Accordingly, we perceive no reason to commute Atkins' sentence of death and will affirm the judgment of the circuit court.

Atkins v. Commonwealth, 260 Va. 375, 390, 534 S.E.2d 312, 321 (2000).

Simply put, the Virginia Supreme Court never decided the Eighth Amendment issue because it never was asked to do so. Because the claim was not raised in the court below, this Court has no jurisdiction to consider it. See Michigan v. Long, 463 U.S. 1032, 1039 (1983); Yee v. Escondido, 503 U.S. 519, 533 (1992); Illinois v. Gates, 462 U.S. 213, 218-220 (1983); Rule 14.1(g)(1).

II. ATKINS' SUPPLEMENTAL CLAIM RAISES A FACTUAL QUESTION AND, THUS, IS NOT APPROPRIATE FOR CERTIORARI.

In conducting the proportionality review mandated by Virginia Code § 17.1-313(C), the Virginia Supreme Court described the conflicting evidence of Atkins' alleged mental retardation:

> Atkins' full scale IQ score was based on a test known as the Wechsler Adult Intelligence Scale-III (WAIS-III), which was administered to him by a forensic clinical psychologist, Dr. Evan Stuart Nelson. According to Dr. Nelson, Atkins' full scale IQ of 59 means that Atkins is mildly mentally retarded. *See* American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV) 40 (1994). However, Dr. Nelson also acknowledged that Atkins might have scored two or three points higher if he had not been mildly depressed when Dr. Nelson administered the test.
>
> Dr. Nelson further explained that a diagnosis of mental retardation is not simply a question of an IQ score. Mental retardation also involves the inability to function independently as compared to the norm for persons of the same age. Consequently, a diagnosis of

---

* Atkins phrased the issue thusly: "Is the sentence of death excessive (Assignments of Error 1 and 2)." Atkins' assignments of error 1 and 2 read:

> 1]. The sentence of death was imposed under the influence of passion, prejudice or other arbitrary factor.
>
> 2]. The sentence of death is excessive or disproportionate to the penalty imposed in similar cases.

(Copy of Atkins' direct appeal brief attached).

mental retardation is based on an individual's IQ scores along with that person's ability to function in the world. Finally, despite his opinion that Atkins is mildly mentally retarded, Dr. Nelson admitted that Atkins' capacity to appreciate the criminal nature of his conduct was impaired, but not destroyed; that Atkins understood that it was wrong to shoot Nesbitt; and that Atkins meets the general criteria for the diagnosis of an antisocial personality disorder.

In addition to Dr. Nelson's testimony, the jury heard testimony from Dr. Stanton E. Samenow, a forensic clinical psychologist called as a witness by the Commonwealth. Based on two interviews with Atkins, ***Dr. Samenow "sharply disagree[d]" with Dr. Nelson's conclusion that Atkins is mildly mentally retarded. Instead, Dr. Samenow testified that Atkins is of at least average intelligence.*** Dr. Samenow based his conclusion on Atkins' vocabulary, knowledge of current events, and other factors from the Wechsler Memory Scale, Wechsler Adult Intelligence Scale and Thematic Apperception Test. For example, Atkins knew that John F. Kennedy was the president in 1961. He also correctly identified the last two presidents, as well as Virginia's current governor. Dr. Samenow further explained that Atkins used "sophisticated words" such as "orchestra," "decimal," and "parable;" that Atkins could recall information Dr. Samenow asked him to remember; and that Atkins could put together a story involving cause and effect.

Dr. Samenow also reviewed Atkins' academic records and noted that, while Atkins had passed the Literacy Passport Test, his academic performance had been terrible and that his school records were "punctuated with statements" by teachers about Atkins' lack of motivation and concentration, his poor study habits, and his ability to do better in school. Finally, Dr. Samenow, like Dr. Nelson, opined that Atkins was able to appreciate the criminality of his conduct and to conform his behavior to the requirements of the law, and that Atkins satisfies most of the criteria for the diagnosis of an antisocial personality disorder.

* * *

Because Atkins asserts that he cannot be sentenced to death due to alleged mental retardation, we must consider, as part of our proportionality review, the same evidence heard by the jury regarding Atkins' mental capacity. In examining that evidence, we find it significant that both Dr. Nelson and Dr. Samenow agreed that a diagnosis of mental retardation involves more than merely

determining a person's IQ score; it also requires consideration of an individual's adaptive functioning.

With regard to the issue of adaptive functioning, Dr. Nelson testified that, in determining an individual's ability to function independently, it was necessary to talk with family members, and to review school and employment records. He further stated that he had followed through on that inquiry by reviewing Atkins' academic records and talking to Atkins' parents. As a result of the inquiry, Dr. Nelson reported that Atkins had received poor grades, failed many tests and classes, and was placed in remedial academic courses on a number of occasions. He also stated that Atkins' parents described a number of deficits, but Dr. Nelson never elaborated on the nature of those deficits. In other words, Dr. Nelson never identified an area of significant limitation in Atkins' adaptive functioning other than what he termed Atkins' "academic failure."

In contrast, Dr. Samenow provided the following explanation when asked whether Atkins has any impairment in his adaptive functioning:

> Well, Mr. Atkins never lived independently. In other words, he was not a self-supporting member of society. However, he told me he was able to wash his clothes, wash and dry his clothes, he used his parents' washing machine and dryer. He told me – when I asked him if he was able to cook, he gave me his recipe for cooking chicken.
>
> This Defendant...as I understand it, lived a life in which he didn't work, and I don't mean just didn't hold a job, that he didn't do, but then again there are a lot of 18-year-olds who maybe haven't worked because they've been in school. But he didn't work in school, either.
>
> So the point is he chose a certain – to live a certain way of life, and there was no lack of ability to adapt and to take care of basic needs.

Atkins, 260 Va. at 386-390, 534 S.E.2d at 319-321 (footnotes omitted) (emphasis added). Given the conflicting evidence on the issue of whether Atkins even is mentally retarded, Atkins' case does not present the question that he would have this Court decide: whether the Eighth Amendment prohibits execution of a mentally retarded capital murderer. In any event, the

Virginia Supreme Court's fact-specific determination that Atkins' alleged mental retardation did not render his sentence disproportionate under state law does not warrant a grant of certiorari. See Texas v. Mead, 465 U.S. 1041 (1994) (Stevens, J.) (court does not review cases which primarily present questions of fact). See also Pulley v. Harris, 465 U.S. 371 (1984) (proportionality review raises no federal issue).

CONCLUSION

Certiorari should be denied.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA,
Respondent herein.

By: _____
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RESPONDENT'S CERTIFICATE OF SERVICE

I am counsel for the respondent in the captioned matter and a member of the Bar of the Supreme Court of the United States. On April 4, 2001, the Respondent's Brief in Opposition was sent by U.S. Mail to the Clerk of this Court and a copy of the same was mailed to Robert E. Lee, Jr., Esquire, Virginia Capital Representation Resource Center, Third Floor, 2421 Ivy Road, Charlottesville, Virginia 22903, counsel for petitioner.

_____
Pamela A. Rumpz
Assistant Attorney General

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COMMONWEALTH of VIRGINIA

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April 4, 2001

The Honorable William K. Suter, Clerk
Supreme Court of the United States
One First Street, N.E.
Washington, D.C. 20543

Re: Atkins v. Commonwealth
No. 00-8452

Dear Mr. Suter:

Please find enclosed the original and ten copies of the Respondent's Supplemental Brief in Opposition, to be filed on behalf of the respondent in the above-referenced case.

Thank you for your assistance in this matter.

Very truly yours,

Pamela A. Rumpz
Assistant Attorney General
Criminal Litigation Section

Enclosures

cc: Robert E. Lee, Jr., Esquire

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